

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFPH:CHI:2:TL-N-2163-00
WTDerrick

date: September 14, 2001

to: David Oyler
Team Manager, LMSB:RFPH:1531

from: Associate Area Counsel (LMSB), Chicago

subject: [REDACTED]
Agreement to Obtain Computer Software Executable Code

This memorandum responds to your request for assistance dated August 20, 2001. This memorandum should not be cited as precedent.

DISCLOSURE STATEMENT

This memorandum may contain privileged information. Any unauthorized disclosure of this memorandum may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

QUESTION

[REDACTED] filed claims for refund with the aid of two computer software programs owned by [REDACTED]. To obtain the executable code of the programs, should the Service sign [REDACTED]'s agreement regarding safeguards to ensure protection of trade secrets and other confidential information, should the Service counter with an agreement of its own, or should the Service sign nothing because Congress already provided the safeguards in I.R.C. § 7612(a)(2) and (c)(2)?

CONCLUSION

In I.R.C. § 7612(a)(2) and (c)(2), Congress gave [REDACTED], as well as other taxpayers and owners of software, specific safeguards to ensure protection of trade secrets and other confidential information. Regarding these specific safeguards, [REDACTED] is entitled to no more and no less. The Service should not sign [REDACTED]'s agreement and should not

counter with one of its own. If [REDACTED] will not turn over the executable code, the Service should serve the firm with a summons.

FACTS

For its taxable years [REDACTED] through [REDACTED], [REDACTED] filed claims for additional FSC commission expenses. [REDACTED] computed the expenses on a transaction-by-transaction basis using two computer software programs owned by [REDACTED]. The Service determined that it could not effectively and timely examine [REDACTED]'s claims without the executable code for [REDACTED]'s two software programs. The Service informally requested the executable code from both [REDACTED] and [REDACTED], and after both refused to comply, it formally requested the code (see I.R.C. § 7612(b)(3)(B)).

In response to the formal request, [REDACTED] agreed to turn over the executable code if the Service would sign an agreement with the following provisions:

1. The software will be used only by examining agent Charles Witt and only in connection with the examination of the FSC commission claims for refund filed by the taxpayer for the years ended December 31, [REDACTED], through December 31, [REDACTED].
2. The software will be maintained by the IRS in a secure area or place on the premises of the taxpayer.
3. The software will not be copied, except for its transfer to the hard drive of the computer.
4. When the software is no longer needed to complete the examination of the taxpayer's FSC claims for refund, the software will be returned to the undersigned [REDACTED]. Both the software, and any results or materials arising from use of the software, which are retained on the hard drive of a machine or other mass storage device, will be permanently deleted.
5. The software will not be decompiled or disassembled.
6. The software will be treated as return information for purposes of § 6103 of the Internal Revenue Code of 1986, as amended.
7. Upon completion of the audit of the taxpayer's FSC claims for refund, the Internal Revenue Service will deliver to the undersigned [REDACTED] a written certification

signed under penalties of perjury from examining agent Charles Witt that he and the Internal Revenue Service have complied with all of the above provisions.

The Service would not agree to the above provisions but would be willing to agree to the following provisions:

1. Software will be treated as tax return information under § 6103 (I.R.C. § 7612(c)(2)(H)) and will be protected by the Service in the same manner as other tax return information (I.R.C. § 7612(c)(2)(C)).
2. The software will only be used by IRS personnel assigned to the taxpayer's examination team, or IRS personnel in Appeals or IRS personnel in Counsel, until all issues related to the software computations are finally resolved (I.R.C. § 7612(c)(2)(A) and (B)).
3. The software will only be copied as required to examine and resolve computation issues. All copies will be numbered (I.R.C. § 7612(c)(2)(D)).
4. The software will not be decompiled or disassembled (I.R.C. § 7612(c)(2)(F)).
5. Upon the final resolution of all issues, the software and all copies will either be returned to the provider, or all copies of the software will be deleted from IRS software devices. The Service will then provide written certification, under penalty of perjury, that all software copies have either been returned to the provider or permanently deleted from storage devices (I.R.C. § 7612(c)(2)(E)).

DISCUSSION

Under I.R.C. § 7612(a)(2), any software provided to the Service is provided subject to the safeguards of § 7612(c). For this purpose, software includes, among other things, computer software executable code and related user manuals. I.R.C. § 7612(d)(1) and (3). Section 7612(c)(2) provides very specific safeguards to ensure protection of trade secrets and other confidential information when software comes into the possession of the Service in the course of any examination regarding any taxpayer. See I.R.C. § 7612(c)(2)(A)-(H).

We do not believe it is necessary or appropriate to modify these specific safeguards. [REDACTED] is entitled to no more and

no less than what other taxpayers and owners of software are entitled to in § 7612(c)(2). Thus, the Service should not sign [REDACTED]'s agreement and should not counter with one of its own. If [REDACTED] will not turn over the executable code, the Service should serve the firm with a summons.

We did not coordinate this advice with an Industry Counsel because the issue does not appear to be within the scope of the responsibility of any Industry Counsel. We instead informally coordinated with Peter Reilly of CC:PA:APJP.

For questions regarding this memorandum, please contact William Derick at (312) 886-9225 extension 318.

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